Supreme Court, U.S.
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NO. _____,

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

THE STATE OF OKLAHOMA,

Petitioner,

v.

JACKIE EUGENE HUMPHREY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS

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QUESTION PRESENTED

Whether the Oklahoma appellate court's ruling that the punishment option of life without parole in First Degree Murder cases should be available to those persons who committed the crime before the life without parole option went into effect, but were tried after the effective date, violates federal and state constitutional principles.

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JACKIE EUGENE HUMPHREY,

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PETITION FOR WRIT OF CERTIORARI

Petitioner, the State of Oklahoma, by and through Susan Brimer Loving, Attorney General of the State of Oklahoma, respectfully requests that this Court issue a Writ of Certiorari to review the decision of the Oklahoma Court of Criminal Appeals.

OPINION BELOW

The published opinion of the Oklahoma Court of Criminal Appeals is recorded at Humphrey v. State, 864 P.2d 343 (Okla. Crim. App. 1993).[1]

JURISDICTION

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257 (a).

STATEMENT OF THE CASE

The defendant, Jackie Eugene Humphrey, was convicted of the crime of First Degree Murder in Okmulgee County, Oklahoma, in Case No. HCRF-87-5001. Humphrey stabbed his common law wife, Bessie Phipps, to death on New Years Day in the Cuban Bar in

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[1] The Court of Criminal Appeals did not set forth a complete discussion of this issue in Humphrey but relied on its opinions in Hain v. State, 852 P.2d 744 (Okla. Crim. App. 1993) and Salazar v. State, 852 P.2d 729 (Okla. Crim. App. 1993), rehearing denied, 859 P.2d 517 (1993). The State has petitioned for a writ of certiorari in Hain and that matter is currently before this Court in Case No. 93-1252.

Henryetta, Oklahoma. The murder was preceded by threats against Ms. Phipps made in the presense of witnesses.

In 1987 the Oklahoma legislature amended the punishment statute for First Degree Murder, Okla.Stat. tit. 21 § 701.10 (1987), adding a third, middle range, punishment option of life imprisonment without the possibility of parole. The amendment's effective date was November 1, 1987, and contained no language regarding retroactive application.

At the time Humphrey murdered Bessie Phipps, the punishment options for First Degree Murder were life imprisonment or death. By the time the defendant was tried, however, the new amendment had gone into effect adding the third option of life without parole.

In Humphrey's direct appeal, the Court of Criminal Appeals affirmed his conviction for First Degree Murder but reversed the

death sentence imposed by the jury and ordered the case remanded for a new sentencing proceeding, at which time the jury should be given all three sentencing options now available for First Degree Murder, including life without parole.

SUMMARY OF THE ARGUMENT

The Oklahoma appellate court's decision that life without parole is a sentencing option for those persons who committed murder before the effective date of the life without parole amendment violates federal and state constitutional standards of equal protection, and cruel and unusual punishment.

REASONS FOR GRANTING THE WRIT

I.

THE COURT OF CRIMINAL APPEALS' DECISION IS CONTRARY TO ITS OWN PRIOR HOLDINGS AND THE HOLDINGS OF OTHER STATE COURTS.

In the opinion below, the Oklahoma Court of Criminal Appeals reversed and remanded

the sentence of death to the district court for resentencing. In doing so, the Court relied on its earlier opinion in Hain v. State, 852 P.2d 744 (Okla. Crim. App. 1993) where the Court found that "given the gravity of the death penalty", "principals of fundamental fairness" compelled them to remand for a new second stage trial since the amendment to Okla.Stat.tit. 21 § 701.10 (1987) providing for the option of life without parole was in effect at the time of the trial. Hain, 852 P.2d at 753.

In its decisions on this issue, the Court of Criminal Appeals ignored its own well settled law. Oklahoma has in the past consistently held that the punishment in effect at the time the crime was committed is the punishment to which the perpetrator should be subjected. Other jurisdictions have held similarly. See State v. Hardy, 489 A.2d 508, 512 (Me. 1985); Ruplenas v. Commonwealth, 275 S.E. 2d 628, 632 (Va.

1981); Galbraith v. State, 693 P.2d 880, 882 (Alaska Ct. App. 1985); State v. Zaehringer, 325 N.W.2d 754, 761 (Iowa Ct. App. 1982); State v. Sylva, 795 P.2d 947, 950 (Kan. Ct. App. 1990); State v. Henning, 599 P.2d 318, 329 (Kan. Ct. App. 1979).

In the case of Pollard v. State, 521 P.2d 400 (Okla. Crim. App. 1974) the petitioner had been sentenced to serve ten (10) years for the crime of Grand Larceny, After Former Conviction of a Felony. Mr. Pollard's former felony conviction was Possession of Marihuana, which had been subsequently reclassified by the state legislature as a misdemeanor. In rejecting Mr. Pollard's post conviction relief appeal, this Court stated in its syllabus:

1. **The law in force defining a criminal offense at the time the crime was committed is the law governing the classification of the offense and the punishment that can be imposed therefore,** and this is true notwithstanding the enactment of a statute reclassifying the crime and reducing punishment, prior to the trial of the offender, unless such statute contains

language expressing the intent of the Legislature that the classification and sentence reduction are to be applied retroactively.

and, ultimately held:

[T]he Legislature may make retroactive a statute lessening the punishment and classification of an offense, but the intent to do so must be affirmatively expressed in said statute.

Pollard, 521 P.2d at 401, 402 (emphasis added).

In the 1912 case of Lilly v. State, 7 Okl.Cr. 284, 123 P. 575 (1912) the plaintiff had committed the crime of conjoint robbery in January, 1908. At the time of the crime the punishment prescribed was life imprisonment. However, on March 23, 1909, the Legislature changed the punishment from life imprisonment to a term of five (5) to fifty (50) years imprisonment. The appellate court had ruled that the case had to be sent back for retrial on other grounds, and, having noted that the trial court had improperly

instructed the jury on the punishment range of five (5) to fifty (50) years during the first trial, held:

> [T]hat the district court of Lincoln county, upon a retrial of this case, should submit the punishment for conjoint robbery **under the statute as it existed at the time the offense is alleged to have been committed.**

Lilly, 123 P. at 578 (emphasis added).

In the case of Penn v. State, 13 Okl.Cr. 367, 164 P. 992 (1917) the defendant was under eighteen (18) years old and was charged with statutory rape. The victim was over fourteen (14) years of age. The defendant committed the crime on May 9, 1913. A statute went into effect on May 16, 1913, holding that consensual intercourse under the above facts was not rape. The petitioner contended that he was entitled to the application of the statute which was in effect (the May 16, 1913, statute) at the time of his trial. This Court disagreed, holding:

> **The very minute this crime was committed the defendant became amenable to the law as it then existed.** He then and there by his own voluntary conduct incurred the penalty of that law, and the constitutional provision aforesaid prevents the Legislature of this state from wiping out penalties for crimes committed prior to the taking effect of a repealing statute.
>
> . . .
>
> **We hold, therefore, that this defendant was subject to any penalty imposed by law for this crime on the date of its commission**, and any subsequent statute repealing such penalty can only operate prospectively, and is applicable only to offenses committed after the statute took effect.

Penn, 164 P. at 993 (emphasis added). See also Cooper v. State, 432 P.2d 951 (Okla. Crim. App. 1967).

As recently as 1990 the Court of Criminal Appeals held that:

> It is a well established rule of law that the appropriate criminal penalty is the penalty in effect at the time the defendant commits the crime.

Bowman v. State, 789 P.2d 631 (Okla. Crim. App. 1990).

The decision in this case violates the holdings of all of the Oklahoma cases

discussed above and well as those of other jurisdictions, and should be reviewed by this Honorable Court.

II.

THE COURT OF CRIMINAL APPEALS BASED ITS DECISION ON AN ERRONEOUS APPLICATION OF A "DEATH IS DIFFERENT" STANDARD FOR CAPITAL CASES.

It is a well established rule of law that unless specified otherwise, statutes only have prospective, and not retroactive, application. See e.g. Edwards v. State, 591 P.2d 313, 317 (Okla. Crim. App. 1979); In re Bomgardner, 711 P.2d 92, 95 (Okla. 1985); In re McNeely, 734 P.2d 1294, 1296, n. 7 (Okla. 1987).

The life without parole amendment under § 701.10 did not specify that it was to have retroactive application. The primary reason the Court of Criminal Appeals gave for treating § 701.10 differently is because it dealt with capital cases, citing

this Court's decision in Caldwell v. Mississippi, 472 U.S. 320, 329, 105 S.Ct. 2633, 86 L.Ed.2d 231, 239 (1985). Hain, 852 P.2d at 753; Salazar, 852 P.2d at 739.

As the dissent in both Hain and Salazar pointed out:

> While the final nature of the death penalty may result in a more microscopic review of the facts of a case, it does not change basic principle of the application of a rule of law, or the manner of consistently applying the law.

Hain, 852 P.2d at 755.

This Court has recognized that the penalty of death is qualitatively different from a sentence of imprisonment. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case. Woodson v. North Carolina, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976). However, this need for heightened

reliability does not translate into an application of different legal standards to capital cases.

In Boyde v. California, 494 U.S. 370, 110 S.Ct. 1190, 108 L.Ed.2d 316 (1990), this Court articulated the standard for evaluating ambiguous jury instructions. In so doing, this Court stated:

> There is, of course, a strong policy in favor of accurate determination of the appropriate sentence in a capital case, but there is an equally strong policy against retrials years after the first trial where the claimed error amounts to no more than speculation.

This statements is indicative of this Court's policy that while the qualitative different of death from all other punishments requires a greater degree of scrutiny, it does not require that state procedural rules or constitutional provision be ignored.

In Spaziano v. Florida, 468 U.S. 447, 456, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984), this Court reaffirmed its commitment to the demands of reliability in decisions involving death but was unwilling to close its eyes to the social of cost of a rule which would require that the jury be instructed on lesser included offenses for which the defendant may not be convicted.

This Court has also refused to apply a different category of rules in recent capital cases involving the enforcement of procedural default rules. Herrera v. Collins, 506 U.S. ___, 113 S.Ct. 853, 122 L.Ed.2d 203 (1993); McCleskey v. Zant, 499 U.S. 467, 111 S.Ct. 1454, 113 L.Ed.2d 517 (1991); Coleman v. Thompson, 501 U.S. ___, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991); Smith v. Murray, 477 U.S. 527, 539, 106 S.Ct. 2661, 91 L.Ed.2d 434 (1986) (this Court rejected the concept that when a defendant in a capital case raises a

"substantial, colorable" constitutional claim, a federal court should entertain it no matter how egregious the violation of state procedural rules).

While procedural statutes may be retroactively applied, substantive statutes may not. The Supreme Court of Kansas, in discussing whether a statute enlarging the jurisdiction of the juvenile courts applied to cases then pending on appeal, stated:

> As related to criminal law and procedure, **substantive law is that which declares what acts are crimes and prescribes the punishment therefor;** whereas, procedural law is that which provides or regulates the steps by which one who violates a criminal statute is punished. (22 C.J.S. § 1 a; 40 Words and Phrases, Substantive Law, p. 859).

State v. Augustine, 416 P.2d 281 (Kan. 1966) (emphasis added). Likewise, in an Arizona case, the court held that certain changes in that State's rules of evidence were procedural and not substantive, where:

> the crimes for which the defendant was charged, **the punishment to be imposed,** and the quantity of degree of proof necessary

to convict remained the same; only the admissibility of certain evidence was changed.

State v. Steelman, 585 P.2d 1213 (Ariz. Ct. App. 1978) (emphasis added).

Thus, the legislation in this case, in adding a middle, third tier to the possible punishment ranges for First Degree Murder, constituted a change of substantive, and not procedural law. The change did not merely affect the method of enforcing the punishment, but the actual statutory punishment itself. Therefore, absent specific legislative intent, the amendment should not have been applied retroactively. Merely because the case deals with capital punishment does not allow disregard for well settled precedent. The Court of Criminal Appeals seriously misapplied this Court's holding in Caldwell and its progeny by using the "death is different" adage to disregard established precedent. The Court provided no justification for its departure

from prior holdings other than the use of broad, generalized terms such as "fundamental fairness" and "demands of justice" based on the fact that this is a capital case. The Court stated in Hain:

> Quite simply, we cannot justify a decision which would act as a total bar to consideration of a punishment alternative to death merely because the crime giving rise to the trial occurred a short time before the effective date of previously enacted legislation.

Hain, 852 P.2d at 753. This comment is in direct contradiction to well-established law and cannot be justified by relying on the "gravity of the death penalty". The result of the Court's misapplication of this amorphous "death is different" concept is an unconstitutional and contrived mechanism for re-sentencing in certain capital cases and warrants review by this Court.

III.

THE COURT OF CRIMINAL APPEALS DECISION VIOLATES EQUAL PROTECTION BY PROVIDING AN ADDITIONAL SENTENCING OPTION TO PERSONS TRIED AFTER NOVEMBER 1, 1987, WHICH IS NOT AVAILABLE TO SIMILARLY SITUATED PERSONS TRIED BEFORE NOVEMBER 1, 1987.

The Court of Criminal Appeals in its decisions on this issue[2] has impermissibly caused disparate treatment of persons similarly situated. The defendant Humphrey belongs to a class of criminals who committed First Degree Murder prior to November 1, 1987. Because he was tried after that date, however, the Court of Criminal Appeals has ruled that he is entitled to a new sentencing proceeding at which he will receive the benefit of a third sentencing option. Other criminals

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[2] See Hain v. State, 852 P.2d 744 (Okla. Crim. App. 1993); Salazar v. State, 852 P.2d 729, **rehearing denied**, 859 P.2d 517 (Okla. Crim. App. 1993); Wade v. State, 825 P.2d 1357 (Okla. Crim. App. 1992); and Allen v. State, 821 P.2d 371 (Okla. Crim. App. 1991).

in the class who were tried before November 1, 1987, are not entitled to the same results. A violation of equal protection occurs when the government treats someone differently than another who is similarly situated. See Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 439, 105 S.Ct. 3249, 3254, 87 L.Ed.2d 313 (1985). The State submits that this disparate treatment violates the Fourteenth Amendment to the United States Constitution.

It is completely conceivable that two murderers (perhaps even accomplices in the same act) who committed their crimes before November 1, 1987, will be treated differently under the Court's holding. If Murderer A vigorously pursued his speedy trial rights and was tried before November 1, 1987, he would be entitled to only two sentencing options upon conviction of First Degree Murder, the options of life imprisonment or death. If Murderer B, on

the other hand, drug his feet, and obtained a number of continuances so that he were tried after November 1, 1987, he would be entitled to three sentencing options upon his conviction for First Degree Murder. The disparate treatment of Murderer A and B cannot withstand constitutional scrutiny.

The Court's holding is also flawed because it does not define at what point the defendant becomes entitled to the life without parole option. Would a trial that began in October, 1987, but in which the sentencing verdict was not rendered until November 1, 1987, come under the terms of the Court's holding, or only those trials in which the proceedings began after November 1, 1987? The Court's decision, in an attempt to provide capital defendants with all possible constitutional entitlement, has created constitutional infirmities where none previously existed.

Since the Court of Criminal Appeals' decision in this case and others, the Oklahoma legislature has attempted to remedy the situation by amending Okla.Stat. tit. 21 O.S. § 701.10(a) (1993) which deals with the procedure to be followed in capital cases which have been remanded. Under the new amendment to § 701.10(a), once a case is remanded for resentencing, the defendant shall not be entitled to the life without parole option if the crime occurred before November 1, 1987.

Thus, another anomaly has been created. If the Court of Criminal Appeals opinions in Allen, Wade, Hain, Salazar, and Humphrey stand, then all cases in which the murder occurred before November 1, 1987, but the trial occurred after November 1, 1987, will be remanded for re-sentencing so that the life without parole option may be considered. Under the Legislature's new amendment to § 701.10(a), however, the life

without parole option may not be given. Oklahoma prosecutors, defense attorneys, and trial judges have been thrust into the situation of deciding whether to abide by the Court of Criminal Appeals' decisions or the legislature's statutory law - both cannot be followed.

As further evidence of the muddied legal precedent that the Court of Criminal Appeals has created, in Wade v. State, 825 P.2d 1357 (Okla. Crim. App. 1992), the Court of Criminal Appeals held that, though the defendant was entitled to the life without parole option, he had to specifically request it at trial and waive his constitutional right against the application of any ex post facto law. Wade, 825 P.2d at 1363. This request and waiver requirement was not followed in the Hain, Salazar and Humphrey cases.

The Court of Criminal Appeals has unconstitutionally differentiated between

similarly situated individuals in an arbitrary and capricious manner with no reasonable basis. It has created legal precedent which is internally inconsistent, illogical, and impossible to follow. This Court should accept this case for review.

CONCLUSION

This Court should grant the Petition for Writ of Certiorari to review the decision of the Court of Criminal Appeals.

Respectfully submitted,

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